

No. 2491.

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United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Rialto Irrigation District, <i>Plaintiff in Error,</i> <i>vi.</i> N. W. Stowell, <i>Defendant in Error.</i>	}
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PETITION OF DEFENDANT IN ERROR.

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FILED

NOV 16 1917

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J. W. SWANWICK,  
*Attorney for Defendants in Error.*



United States  
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Rialto Irrigation District,  
*Plaintiff in Error,*

*vs.*

N. W. Stowell,  
*Defendant in Error.*

No. 2491.

Rialto Irrigation District,  
*Plaintiff in Error,*

*vs.*

Burt Chellis,  
*Defendant in Error.*

No. 2492.

Burt Chellis,  
*Plaintiff in Error,*

*vs.*

Rialto Irrigation District,  
*Defendant in Error.*

No. 2493.

Petition of N. W. Stowell, Defendant in Error in Case No. 2491, and of Bert Chellis, Defendant in Error in Case No. 2492 and Plaintiff in Error in Case No. 2493 for Rehearing, and Statement of Same Parties on Motions for Modification of Orders of Reversal.

An opinion was filed by this court in cause No. 2491 on October 15th, 1917, by which the judgment is reversed and the cause remanded to the court below for

further proceedings not inconsistent with the views therein indicated; on October 16th orders were made in each of the other causes above named, Nos. 2492 and 2493, by which the judgments were reversed for further proceedings not inconsistent with the views expressed by the court in the opinion above referred to.

In each case a motion has been filed for a modification of these orders of reversal. These motions came on regularly for hearing November 5th, 1917, at which time, upon the suggestion of the court, time was given to counsel for the moving party within which to serve and file a written statement of his position in order that the same might be submitted to the justices of the court not present at the argument.

Under rule 32 of the rules of this court, the mandate is due to issue within thirty days from the date of the order of reversal, unless within said time a petition for rehearing be filed. At the hearing of the motions for modification of the orders of reversal, it was suggested by the court that perhaps the proper practice to present the points there made would be by a petition for rehearing. In order to meet this suggestion and in order that there may be no question as to the stay of the mandate, this petition for rehearing is presented. This petition is served within the time allowed within which to file the statement above referred to, it would serve no useful purpose to repeat what we desire to say in this petition. We will therefore ask the court to consider this document both as a petition for rehearing and a statement of our position on the motions for modification of the orders of reversal.

The orders of reversal in the three cases having all

been based upon the opinion rendered in No. 2491, and the points being similar, we present one form of petition and statement in each of the cases.

The motions are for orders instructing the lower court to reduce the judgments entered October 6th, 1913, in amounts as follows:

No. 2491 .....\$47,930.00

No. 2492 ..... 61,759.85

No. 2493 ..... 4,367.00

and that in all other respects said judgments be affirmed. Plaintiff in error, Rialto Irrigation District, to recover its costs.

By this petition for rehearing the defendants in error ask for the same orders.

This petition does not involve any request to this court to in any way change the conclusion stated by it in its opinion rendered in No. 2491, filed herein October 15, 1917.

The points decided by this court in its opinion, in so far as material here, may be summarized as follows:

First: The bonds issued under the contract between the Rialto Irrigation District and N. W. Stowell of January 2, 1895, are invalid. (See opinion, page 11.)

Second: The other bonds upon which the judgment of the lower court was, in part, based, constituted valid obligations of the district. (See opinion, page 12.)

Third: The defense of the statute of limitations interposed by the district is upheld.



Defendants in error, petitioners here, are therefore only entitled to recover upon the portions of the bonds which this court has held to be valid obligations of the district—and which are not barred by the statute of limitation. The various amounts in which we have asked that the several judgments be reduced represent the amounts of the void bonds and of the installment of interest and principal of the other bonds which this court holds are barred. At the oral argument of the motions the court pertinently asked why the relief sought could not accomplish in the lower court after the reversal. Our answer to that query is this: these actions are based upon coupons attached to bonds of the district, some for installments of principal and some for interest upon the principal. Neither the installment nor interest coupons bear interest after maturity; each installment coupon contains the following: "Interest on said installment will cease after maturity" [Tr. p. 44]; there is no contract to pay compound interest and therefore no interest can be recovered on the interest coupons—the judgment in each case was recovered October 6th, 1913; if the amount of the judgments be reduced as asked the balance will bear interest.

Rule 30 of the rules of this court provides for interest upon judgments of the inferior court which are affirmed under that rule, we would be entitled to 7% interest, the rate provided in California, on the portion of the judgments affirmed.

The court below could not allow interest upon a reversal such as is ordered here—the judgment is gone. There would have to be a new trial and interest could

only be recovered from the date of the new judgment. By its opinion this court in effect says that the judgment of the lower court is valid except in so far as it is based upon the void bonds and the barred bonds and coupons. We contend that these amounts can easily be determined from the record and that the judgments should be affirmed in the amounts in which they are not erroneous.

The theory of the defendant in error upon the question of the statute of limitations was based, to a large extent, upon the idea that the only judgment which could be recovered was a judgment establishing the validity and the amount of the indebtedness represented by the bonds; that it was not a judgment upon which an execution would lie, but only a judgment which might be used as the basis of another proceeding for the purpose of obtaining the money for its satisfaction. (See page 13 of opinion.)

This court, by its opinion, holds that theory erroneous. We respectfully submit that if the judgments rendered are ordinary, common law money judgments upon which an execution might issue, we are certainly entitled to the full benefit of the judgments in so far as they are valid.

The three cases were tried together in the court below. A bill of exceptions was settled in each case. This bill of exceptions in No. 2491 appears on pages 51 and following, of the printed transcript of record. The bill of exceptions in each of the other cases appears in the record of these cases on file in this court, neither of said records having been printed (the printing of same having been obviated by stipulation).

The testimony in regard to the bonds in question is identical in each bill of exceptions. This testimony appears upon pages 56 and 57 of the printed transcript in No. 2491, was given by N. W. Stowell, and is as follows:

“The following bonds were delivered to me by the Semi-Tropic Company, under my contract with it of date November 7th, 1890, upon the following dates, to-wit:

January, 1891, bonds numbered 135 to 154; 205 to 234;

January 16th, 1891, bonds numbered 235 to 250;

September 16th, 1891, bonds numbered 251 to 260;

July 3rd, 1892, bonds numbered 939 to 949.

The following bonds were delivered to the Stowell Cement Pipe Company by the Semi-Tropic Company under its contract with the pipe company, of date June 4th, 1892, upon the following dates, to-wit:

November 2nd, 1892, bonds numbered 751 to 755; 901 to 906;

March 27th, 1893, bonds numbered 626 to 662;

July 1st, 1893, bonds numbered 401 to 410;

October 10th, 1894, bonds numbered 305 to 321; 325 to 350; 421 to 425; 476 to 492;

Bonds numbered 665 to 670, 907 (56-5).

The following bonds were delivered to me by the Rialto Irrigation District under my contract with it of date January 2nd, 1895, for the construction of pipe-lines for it, upon the following dates:

February 5th, 1895, bonds numbered 426 to 451;

March 2nd, 1895, bonds numbered 452 to 460;

April 6th, 1895, bonds numbered 461 to 464;

March 2nd, 1897, bonds numbered 465 to 473.”



It thus appears from the record that the only bonds delivered under the contract of January 2nd, 1895, referred to in the opinion of the court, are bonds numbered 426 to 473, inclusive, 48 in number. They will be hereafter referred to as the void bonds.

The amended complaint in 2491 is based entirely on portions of these 48 void bonds. [Tr. p. 20, bond 426, and Tr p. 26, bonds 427-473.] The supplemental complaint in 2491 is based upon some of the coupons upon the 48 void bonds and some coupons upon 11 valid bonds. None of the 48 void bonds are involved in either of the other cases.

No question of void bonds being involved in either 2492 or 2493, we ask that the judgments in those cases be reduced in the amount of the barred coupons. Counsel for the district, on pages 141 to 147 of their brief, have given us the amount of the barred coupons. These figures are correct. Counsel say, page 144:

“If the statute of limitation is held to be applicable to the case at bar, then under the stipulation and order of court above referred to, the judgment in case No. 2492 should be reduced by \$61,759.85 on account of barred coupons sued upon in that case, and in case No. 2493 the judgment should be reduced by \$4,367.00 on account of barred coupons sued upon in that case.”

These being the exact amounts in which we have asked that the judgments be reduced in cases Nos. 2492 and 2493, we submit that orders should be made in those cases accordingly.

The amount claimed in the amended complaint in case No. 2491 is \$30,009.00 [Tr. p. 29], the supple-

mental complaint adds a third cause of action [Tr. p. 42] in which a claim is made for \$20,568.70 more, making the total claim \$50,577.70 [Tr. p. 48]. The \$30,009.00 in the amended complaint is all based upon void bonds; the \$20,568.70 of the supplemental complaint is based partly on void bonds, partly upon barred coupons of valid bonds and partly upon coupons of valid bonds which are not barred.

We ask that the judgment rendered in the lower court in 2991 be reduced by deducting therefrom the sum of \$47,930.00. This sum is made up of the following items:

First. Void bonds in the amended complaint .....	\$30,009.00
Second. Void bonds, supplemental complaint	11,870.40
Third. Barred coupons, supplemental complaint .....	6,050.60
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	\$47,930.00

That the first of these items, void bonds in the amended complaint, should be deducted is clear from the statement that they are void.

As to the other two items:

The supplemental complaint is based upon some installment and interest coupons upon void bonds and some installment and interest coupons upon valid bonds, some of which are barred.

The following is a statement of the entire claim under the supplemental complaint:

# INTEREST COUPONS.

By the supplemental complaint a third count is added to the complaint [Tr. p. 42]; in the first portion of that third count is set out coupon No. 35, amount \$6.60, attached to bond No. 426, one of the void bonds [Tr. p. 43].

Paragraph IV of this third count by reference to paragraph II of the complaint describes bonds Nos. 427 to 473, the rest of the void bonds [paragraph IV of third count, Tr. p. 44; paragraph II, second count, Tr. p. 26]. In paragraph V of the third count [Tr. pp. 44 and 45] eleven other bonds are described, viz.: Nos. 77, 78, 234, 665, 666, 667, 798, 894, 895, 896 and 989 (none of which are included among the void bonds. See testimony of N. W. Stowell quoted above)—thus a total of 59 bonds are described in the third count, and in paragraph VI of that count is a description of the interest coupons upon which the supplemental complaint is based [Tr. pp. 45 and 46]. Some of these coupons are alleged to be attached to all of the 59 bonds involved and some only to a part thereof. For convenience we here tabulate this description as follows:—

59 bonds, each	6 coupons, Nos. 35 to 40=	\$1610.70
11 bonds, each	14 coupons, Nos. 21 to 34=	1848.00
6 bonds, each	9 coupons, Nos. 12 to 20=	810.00
4 bonds, each	2 coupons, Nos. 10 and 11=	120.00
5 bonds, each	1 coupon, No. 9	= 75.00
3 bonds, each	1 coupon, No. 8	= 45.00

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Total interest coupons.....\$4508.70

# INSTALLMENT COUPONS.

In paragraph III of the third cause of action coupon No. 8, attached to bond No. 426, is set out [Tr. p. 46]; in paragraph VII of the same cause of action the amount of the installment coupons involved in that cause of action are set out [Tr. p. 46]. Tabulation as follows:

59 bonds, each 3 coupons, Nos. 8-10=	\$12,980.00
11 bonds, each 7 coupons, Nos. 1-7 =	3,080.00
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Total installment coupons.....	\$16,060.00
Add interest coupons.....	4,508.70
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Amount claimed in third count.....	\$20,563.70

(The prayer of the supplemental complaint is for \$50,577.70 [Tr. p. 48], being the amount of the amended complaint, \$30,009.00, and the above, \$20,563.70.)

The second item making up the total deduction of \$47,930.00, viz.: "Void bonds, supplemental complaint, \$11,870.40," consists of the total amount of the void installment and interest coupons set forth in that complaint; the first item of the foregoing tabulation of the entire claim under the supplemental complaint is "59 bonds, each 6 coupons, Nos. 35 to 40, \$1610.70." The 59 bonds there referred to include the 48 void bonds—so that 6 coupons of each of these 48 void bonds are void, the total of these coupons, being 6 coupons on each of 48 bonds, is \$1310.40. This amount, \$1310.40, is made up of

48 coupons, Nos. 35, \$6.60 each=	\$ 316.80
48 coupons, Nos. 36, \$6.60 each=	316.80
48 coupons, Nos. 37, \$4.65 each=	223.20

48 coupons, Nos. 38, \$4.65 each=	223.20
48 coupons, Nos. 39, \$2.40 each=	115.20
48 coupons, Nos. 40, \$2.40 each=	115.20

Total .....	\$1310.40
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The amount of coupon No. 35 is shown on page 143 of the brief of plaintiff in error as \$6.60 as given above, and the amounts of coupons 36 to 40 is shown by a calculation of the interest upon the unpaid portion of the bonds, to-wit, at the same ratio of decrease in amount of interest coupons shown in the tabulation on pages 142 and 143 of the said brief of plaintiff in error.

The first item of the foregoing tabulation under the heading "Installment Coupons" is of 59 bonds each, 3 coupons Nos. 8 to 10, \$12,980.00." This item also includes 3 coupons Nos. 8 to 10 on 48 of the void bonds. The amounts of these coupons Nos. 8 to 10 are as follows: No. 8 \$65.00 each, No. 9 \$75.00 each, No. 10 \$80.00 each. This is shown by the copy of the bond appearing on page 20 of the transcript of record and the copy of coupon No. 8, page 44; coupon No. 8 is for \$65.00 and is payable January 1, 1909, being 18 years from the date of the bond and for 13% of the principal. No copy of coupons 10 or 11 appears in the record but by the terms of the bonds these coupons would be for 15% and 16% respectively, making No. 10 for \$75.00 and No. 11 for \$80.00, as stated above. The total of these void coupons is as follows:

\$65.00+\$75.00+\$85.00=\$220.00x48=	\$10,560.00
To which we add the previous amount of	1,310.40
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	\$11,870.40



The third item making up the total deduction of \$47,930.00, viz.: "Barred coupons, supplemental complaint, \$6,050.60," is taken from the figures furnished in the brief of counsel for the district (pages 142 and 143), except as noted, showing total amount of the barred coupons, both interest and installment, as follows (giving the totals only):

Interest coupons .....	\$3,287.40
Installment coupons .....	3,080.00
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	\$6,367.40

The last item of the barred coupons appearing on page 143 of the brief and being for coupons No. 35 of \$6.60 each upon 59 bonds, includes the coupons upon the 48 void bonds which are included in the item of \$11,870.40, being the second item above referred to—the amount of these 48 coupons No. 35 of \$6.60 each, viz.: \$316.80, must be deducted from the total of \$6367.40 given in the brief as the barred interest and installment coupons as follows:

Amount stated in brief.....	\$6,367.40
Coupons on void bonds.....	316.80
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Balance.....	\$6,050.60

This last amount is the amount of the third item making up the deduction of \$47,930.00.

#### RECAPITULATION.

No. 2493—deduction asked \$4,367.00.....\$ 4,367.00

The barred coupons shown in brief of plaintiff in error (p. 144).

No. 2492—deduction asked.....\$61,759.85

The barred coupons shown in brief of plaintiff in error (p. 144).

No. 2491—deduction asked.....\$47,930.00

Void bonds, amended complaint..\$30,009.00

Void bonds, supplemental complaint ..... 11,870.40

Barred coupons, supplemental complaint ..... 6,050.60

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\$47,930.00

If the court should disagree with our contention that the record shows the amount of these deductions from the judgments then we ask that the court make an appropriate provision in the order of reversal in each case directing the lower court to ascertain the amount of the bonds involved which are void under contract of January 2nd, 1895, referred to in the opinion filed October 15th, 1917, in case No. 2491, and also the amount of the bonds which are barred by the statute of limitations as held in said opinion and that when these amounts are ascertained the court be directed to deduct the same from the judgments entered in said court, said judgments to be affirmed in other respects.

Plaintiff in error, Rialto Irrigation District, to recover costs.

Respectfully submitted,

J. W. SWANWICK,

*Attorney for Defendants in Error.*

